Supreme Court, U. S.
FILED
OCT 15 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-420

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal From The United States District Court
for the Eastern District of Virginia

MOTION TO AFFIRM

OWEN CLARKE
DOYLE S. MORRIS
CHARLES C. RETTBERG, JR.
3100 Terminal Tower
Cleveland, Ohio 44101

GEORGE D. GIBSON
E. MILTON FARLEY, III
T. S. ELLIS, III
DAVID S. BROLLIER
RICHARD D. GARY
HUNTON, WILLIAMS, GAY & GIBSON
Post Office Box 1535
Richmond, Virginia 23212

Counsel for Appellees

October 16, 1975

TABLE OF CONTENTS

	Page
MOTION TO AFFIRM	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	13

TABLE OF CASES AND AUTHORITIES

Cases

D. C. Transit System v. Washington Metropolitan Area Transit Commission, 466 F.2d 394 (D.C. Cir. 1972) 9

ICC v. Los Angeles, 280 U.S. 52 (1920) 7, 10, 11, 12

Missouri Pac. R.R. v. Norwood, 42 F.2d 765 (W.D. Ark. 1930), *aff'd*, 283 U.S. 249 (1931) 7-8

T.I.M.E. v. United States, 359 U.S. 464 (1959) 12

United States v. Pennsylvania R.R., 242 U.S. 208 (1916) 7, 10, 11, 12

United Tel. Co. of Florida v. Mayo, 215 So.2d 609, *appeal dismissed*, 394 U.S. 995 (1968) 9

Statutes

Act of February 28, 1920 (Transportation Act), Ch. 91, 41 Stat. 456 10

Fla. Stats. Ann., Chs. 364 and 366 9

	Page
Interstate Commerce Act, 49 U.S.C. § 1, *et seq.* (1970)	
49 U.S.C. § 15(7)	9, 12
49 U.S.C. § 15a(2)	8, 9, 10, 12
28 U.S.C. § 2284	2
28 U.S.C. § 2325	2
Code of Federal Regulations	
49 C.F.R. § 1100.19	6
Commission Decisions	
Adequacies - Passenger Service - Southern Pacific, 335 I.C.C. 415 (1969)	8
Container Service, 173 I.C.C. 377 (1931)	8
Duralite Co., Inc. v. Erie Lackawanna Ry., 339 I.C.C. 312 (1971)	8
Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125 (1971)	8
Jacksonville Pt. Term. Oper. Assn. v. Alabama, Tenn. & N. R.R., 263 I.C.C. 111 (1945)	8
Joseph A. Goddard Realty Co. v. New York, Chi. and St. L. R.R., 229 I.C.C. 497 (1938)	8
Missouri-Kansas-Texas R.R. v. Kansas City Terminal Ry., 104 I.C.C. 203 (1925)	8
Oliver Mfg. Supply Co. v. Reading Co., 297 I.C.C. 654 (1956)	8
Wells & Son v. Chicago, B. & Q. R.R., 161 I.C.C. 145 (1930)	8
Commission Reports	
ICC 86th Annual Report to Congress (1972)	8
ICC 84th Annual Report to Congress (1970)	8
ICC 70th Annual Report to Congress (1956)	8
ICC 61st Annual Report to Congress (1947)	8
ICC 56th Annual Report to Congress (1942)	8

In The

Supreme Court of the United States

October Term, 1975

No. 75-420

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal From The United States District Court for the Eastern District of Virginia

---

MOTION TO AFFIRM[1]

Chessie, pursuant to Rule 16 of the Rules of Court, moves that the final judgment and order of the District Court be affirmed on the ground that its unanimous decision is so obviously correct as to warrant no further review.

---

[1] Appellees, The Chesapeake and Ohio Railway Company, The Baltimore and Ohio Railroad Company and the Western Maryland Railway Company, are hereinafter collectively referred to as Chessie. Appellant Interstate Commerce Commission is hereinafter referred to as the Commission. References to the Jurisdictional Statement are denoted by JS followed by the appropriate page number. All emphasis has been added unless otherwise indicated.

QUESTION PRESENTED

Was the three-judge District Court clearly correct in deciding that the Congress has not authorized the Commission to control a carrier's expenditure of funds as a condition to withholding the suspension of rates?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and orders entered on April 22, 1975 by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325 (as then in effect), enjoining the Commission from enforcing against appellees certain provisions of its orders directing how revenues generated from increased rates should be spent.

On April 22, 1974, the nation's railroads filed a petition with the Commission (docketed as *Ex Parte No. 305*) for a ten per cent increase in their freight rates. In support of the petition, railroads other than Chessie submitted evidence in the form of verified statements that the additional revenues were needed for maintenance and capital improvements. Contrary to the Commission's implication (JS *passim*), and unlike the other carriers, Chessie never submitted any evidence as to how the additional revenues would be used.

As the District Court found, Chessie "*at no time*" represented to the Commission that the revenues from the increase would be applied exclusively to deferred maintenance or delayed capital improvements, however those terms might be defined. (JS 15a.) The Commission did not adopt its narrow definitions until after the increased rates had become effective pursuant to its authorization of June 3, 1974.

On June 3, 1974, the Commission suspended the original

tariff proffered by the carriers but authorized the refiling of a new tariff implementing a ten percent increase in freight rates and charges. The Commission's order stated that the carriers "should" spend the additional revenues to be derived from the increase in freight rates (other than amounts needed for increased costs of materials and supplies) on "capital improvements" and "deferred maintenance" of plant and equipment. (JS 46a.) Neither term was defined. The order went on to require the carriers to file reports concerning the extent of deferred maintenance and past and proposed capital spending, as well as estimates of the amount of additional revenues to be derived from the rate increase and the manner in which they were to be employed.

The reporting requirements were mandatory, but the paragraph purporting to govern carrier expenditures was not. Thus, Paragraphs 1, 2, 4 and 5 of the June 3, 1974 order, for reporting requirements, use the mandatory verb "shall" but, Paragraph 3, for expenditure requirements, uses the hortatory verb "should." (JS 45a-46a.) Note also the statement of Vice Chairman O'Neal characterizing the June 3rd order as an "admonition" and calling for sanctions to assure that the desired expenditures were made. (JS 54a.) Hence, the Commission's assertion (JS 6) that the June 3rd order provided that the railroads "must" spend most of the increase on deferred maintenance and "delayed" capital improvements does not reflect the facts.

The railroads, including Chessie, increased their rates by ten percent effective June 20, 1974. Thereafter, on July 18, 1974, the Commission entered a second order which *for the first time* required the expenditure of the additional revenue on "delayed" capital improvements and deferred maintenance, which terms were now *for the first time* nar-

rowly defined by the Commission.[2] Another new requirement was that the funds were not deemed to constitute usable assets of the carriers but were required to be segregated in a separate account unavailable for any other purpose. (JS 64a-66a.)

Chessie promptly sought reconsideration of the July 18th order, unequivocally stating that it had no projects which would qualify under the order. In the petition for reconsideration, Chessie informed the Commission that it had started a $300 million capital improvement program which was ineligible under the July 18th order because financing for the program was available and had been available at all pertinent times.

Reconsideration was denied by order entered August 9, 1974.[3] Chessie instituted the suit below on August 15, 1974, and secured a temporary restraining order against enforcement of the conditions on August 18, 1974.

Thereafter, on October 3, 1974, acting upon petitions filed by railroads other than Chessie, the Commission entered another order permitting the use of the revenue increase for new and additional capital improvements but

[2] "Deferred maintenance" was defined by the Commission in its July order to be "accrued deterioration" in a railroad's plant or equipment which has rendered its services to shippers "partially or wholly inadequate and/or has resulted in diminishing the railroads' competitive ability." (JS 56a.) "Delayed capital improvements" were defined to mean improvements "actually planned" but not undertaken because "funding or financing was not, or projected to be, available through June 30, 1975." (*Id.*)

[3] (JS 77a-84a.) The August 9th order also altered the terms of the July 18th order by changing the cut-off date for determining what constituted delayed capital improvements from June 1, 1974 to January 1, 1974. This earlier date was of no help to Chessie as Chessie's improvement program was undertaken in December, 1973. Also, the August 9th order did not change the requirement that eligible capital improvement programs had to be those for which financing "was not . . . available through June 30, 1975."

only if a carrier is able to establish to the Commission's satisfaction that it could not use the funds for delayed capital improvements and deferred maintenance.[4] In Chessie's view, the requirements of the October 3rd order were equally without statutory authority and Chessie promptly amended its complaint to the District Court to include the October 3rd order.

On April 22, 1975, the District Court in a unanimous decision enjoined enforcement of those portions of the Commission's orders which would have required Chessie to expend its revenues upon projects selected and defined by the Commission. It did not enjoin enforcement of that portion of the Commission's July 18, 1974 order which imposed the reporting requirements and remanded the case to the Commission for further proceedings consistent with the opinion of the District Court.

ARGUMENT

The Commission devotes most of its Jurisdictional Statement to a defense of the wisdom and reasonableness of the Commission's orders, particularly as applied to Chessie, rather than to a discussion of the issue decided by the District Court: namely, whether Congress has authorized the Commission to control a carrier's expenditure of funds as a condition to withholding the suspension of rates.

In its Statement of the Case, Chessie has sought to correct some of the factual errors in the Jurisdictional Statement. Chessie also desires to dispel any implication in the Jurisdictional Statement that Chessie has somehow misap-

[4] The October 3rd order defined the term "new and additional capital improvements" as projects over and above those *presently* undertaken, scheduled or committed. (JS 102a-103a.) Thus Chessie's $300 million capital improvement program undertaken earlier does not qualify.

propriated its new revenues. Chessie's submissions filed with the Commission under the reporting requirements of the July 18th order established that Chessie had expended without legal compulsion *ten times* the amount of additional revenues received from the ten percent rate increase available under the Commission's formula for maintenance and capital improvements. In the first half of 1974, before the rate increase, Chessie spent over $161 million for capital improvements and maintenance. In the first half of 1975, its expenditures for these purposes totaled over $235 million—an increase of roundly $75 million. In contrast, the rate increase generated only $7.4 million in additional revenues in the first half of 1975 after deductions for additional income taxes and increases in the cost of materials and supplies. But, in view of the Commission's narrow definitions of permissible purposes, had it not been for the protection of the temporary restraining order and the judgment below, no portion of Chessie's newly-acquired revenues could have been used for maintenance and capital improvements.[5]

Thus, the Commission's insistence that improvements in plant and equipment be accomplished as it directs rather

[5] The Commission's contention that Chessie's new revenues could be utilized under its orders is foreclosed by the record before the Commission. This contention is nothing more than an attack upon its own record. Subsequent to the July 18th order, Chessie, in its petition for reconsideration, stated that it had no projects within the the scope of the Commission's definitions. Such statements in the petition constitute evidence under the Commission's Rules. 49 C.F.R. § 1100.19. There was no evidence in the record to the contrary (except in respect to only one minor branch line as to which there was a challenge) and, in now claiming to the contrary, the Commission is not only attacking its own record but is also quarreling with its own order. Its August 12, 1974 order stated (JS 81a):

> "[T]he definitions of deferred maintenance and delayed capital improvements . . . reserves to the management of each railroad in the exercise of its proper and prudent managerial functions the determination of the extent to which these conditions exist in respect to their properties."

than as management determines does not serve the desired objective of improvement in railroad plant and equipment. Contrary to the Commission's claim (JS 13), the challenged conditions make it less likely rather than more likely that the public will receive adequate and efficient transportation service.

There is no authority to support the claimed power to impose the challenged conditions. On the contrary, as the District Court correctly stated (JS 19a-21a), the cases on the subject uniformly hold that the Commission has no power to control expenditures. *ICC* v. *Los Angeles,* 280 U.S. 52, 68-69 (1929); *United States* v. *Pennsylvania R.R.,* 242 U.S. 208, 231 (1916); *Missouri Pac. R.R.* v. *Norwood,* 42 F.2d 765 (W.D. Ark. 1930), *aff'd,* 283 U.S. 249 (1931).

In the *Los Angeles* case, the Commission claimed it had no power to compel railroads to build passenger stations. In the *Pennsylvania R.R.* case, the Commission denied any authority to order railroads to buy tank cars. The Court sustained the Commission in both instances, saying:

> "A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from the varied regulatory provisions of uncertain scope." 280 U.S. at 69.
>
> "[I]f Congress had intended such consequence . . . it would not have left its intention to be evolved from obscure language but would have put it in explicit declaration and with notice and time for accommodation to it." 242 U.S. at 231.

And, as the *Norwood* decision held, the Commission's power to grant or deny rate increases does not imply a power of direct control over railroad expenditures:

> "The power to [control expenditures] *directly* would be a decided step in advance of any congressional action

> before the Transportation Act . . . [and the Transportation Act] gives no power of directly supervising carrier expenditures. It provides control *only* through the rate of return allowed by the commission. Also, it clearly is aimed only at voluntary expenditures by the carrier." 42 F.2d at 773 (emphasis in original).

Until now, the Commission has consistently recognized this limitation of its authority. Shortly after enactment of § 15a(2) (49 U.S.C. § 15a(2)), the Commission held that this provision did not authorize it to restrain a carrier from expending revenues on an improvident contract. *Missouri-Kansas-Texas R.R.* v. *Kansas City Terminal Ry.*, 104 I.C.C. 203 (1925). There the Commission remarked:

> "[W]e are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers." 104 I.C.C. at 224.

Since 1920, there have been a host of Commission decisions disclaiming any authority to direct the expenditures of a carrier.[6] Also, there have been repeated representations by the Commission to Congress disavowing any authority to order carriers to purchase or repair equipment, measures within the realm of maintenance and capital expenditures.[7]

---

[6] *Wells & Son* v. *Chicago, B. & Q. R.R.*, 161 I.C.C. 145, 148-149 (1930); *Container Service*, 173 I.C.C. 377, 442 (1931); *Joseph A. Goddard Realty Co.* v. *New York, Chi., and St. L. R.R.*, 229 I.C.C. 497, 502 (1938); *Jacksonville Pt. Term. Oper. Assn.* v. *Alabama, Tenn. & N. R.R.*, 263 I.C.C. 111, 116 (1945); *Oliver Mfg. Supply Co.* v. *Reading Co.*, 297 I.C.C. 654, 658 (1956); *Adequacies-Passenger Service-Southern Pacific*, 335 I.C.C. 415, 420-424 (1969); *Duralite Co., Inc.* v. *Erie Lackawanna Ry.*, 339 I.C.C. 312, 314 (1971); *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 180 (1971).

[7] *ICC 86th Annual Report to Congress* (1972) at 23; *ICC 84th Annual Report to Congress* (1970) at 9; *ICC 70th Annual Report to Congress* (1956) at 83; *ICC 61st Annual Report to Congress* (1947) at 128-130; *ICC 56th Annual Report to Congress* (1942) at 15-21 and 123-129.

As the District Court pointedly observed (JS 18a):

> "Never before has the Commission claimed that this section [15a(2)] expands its ratemaking power to embrace control over the expenditure of a carrier's revenue. Instead its decisions have been to the contrary."

Although the Commission has no precedent under the Interstate Commerce Act,[8] it claims, nevertheless, that authority to impose controls on carrier spending is conferred by § 15a(2) in conjunction with § 15(7) (49 U.S.C. § 15(7)), the suspension power. As the District Court pointed out, the suspension section expressly authorized the Commission to order refunds if an interim rate should be found unlawful, but is "silent about other conditions." (JS 17a.) Obviously, the Commission's suspension power does not

---

[8] The Commission cites merely two cases to support its position. *D. C. Transit System* v. *Washington Metropolitan Area Transit Commission*, 466 F.2d 394 (D.C. Cir. 1972), and *United Tel. Co. of Florida* v. *Mayo*, 215 So.2d 609, *appeal dismissed*, 394 U.S. 995 (1968). Neither is apposite. Neither involved an interpretation of the Interstate Commerce Act. In neither case was a rate increase granted. Neither case constitutes authority for the principle thot the lawfulness of an increase can be made to depend upon the future satisfaction *vel non* of conditions controlling the use of the newly-generated revenues. Instead, the decisions dealt with local regulatory commissions having their own unique statutory framework and history, and both agencies have more extensive powers than those conferred on the Interstate Commerce Commission. Unlike the Interstate Commerce Commission, the Washington Metropolitan Area Transit Commission had been granted comprehensive statutory authority to control every phase of the carrier's business (*e.g.*, to direct the hiring of safety consultants, the repair of air-conditioners and radios, the allocation of funds for marketing promotion, the kind and quality of service on specified routes, the purchase of new air-conditioned buses, the employment of additional supervisors and the expansion of telephone information services). 466 F.2d at 411 n. 120. Similarly, in *United Tel.*, the Florida Public Service Commission had been granted comprehensive power over the utility's affairs (*e.g.*, to require the installation of toll stations and lines, to order improvements to or changes in any line, and to promulgate regulations with respect to installation of equipment, facilities, and service). Fla. Stats. Ann., Chs. 364 and 366.

enlarge its substantive powers. Accordingly, the Commission's case must rest upon implied authority which it says is to be found in § 15a(2).

Section 15a(2) requires consideration of certain factors "[i]n the exercise of [the Commission's] power to prescribe just and reasonable rates." That is all that it does. It does not expand the power to prescribe rates into the power to prescribe the uses to which the carriers' revenues may be applied.

In the only instance where Congress intended to confer upon the Commission jurisdiction over the disposition of carrier revenues, it did so in clear and precise language. This was the so-called Recapture Clause of the Transportation Act of 1920, which provided that:

> "[A]ny carrier which receives . . . an income . . . in excess of a fair return shall hold such part of the excess . . . as trustee for and shall pay it to the United States." Act of February 28, 1920, Ch. 91 § 422, 41 Stat. 456, 489.

With the repeal of the Recapture Clause in 1933, the control granted therein to the Commission over carrier revenue ceased. No other specific Congressional grant of authority to the Commission over carrier revenues has ever been enacted, and there is no basis for reading any into the statute.

In the absence of precedent, the Commission resorts to adjectives, claiming that authority to control spending is "less intrusive" than the powers it disclaimed in the *Los Angeles* and *Pennsylvania R.R.* cases. (JS 13.) The Commission also argues that it has simply required the railroads to spend the funds they said they needed for the purposes stated by the railroads and, if the railroads were dissatisfied with the conditions they had the right to decline the increase. (JS 15.)

As to the first contention, it is obvious that by selecting and defining those projects, and those projects alone, upon which millions of dollars in revenues from the rate increase must be spent, the Commission is attempting to exercise vast powers over the railroads—powers much more intrusive and coercive than those it disclaimed in the *Los Angeles* and *Pennsylvania R.R.* decisions. The question, however, is not whether the asserted power may be characterized as intrusive or otherwise. The question is whether the power exists.

As to the second contention, the Commission is ignoring its lack of power and simply saying: "Take it or leave it." The Commission has, in essence, told Chessie, "We will not suspend, *provided* that you let us tell you what to do with your revenues." The short answer is that the Commission cannot forego its power to suspend as a trade-off for its imposition of unlawful conditions. The District Court was clearly right in refusing to permit the Commission to use its suspension power to legislate for itself new and revolutionary authority without any action by the Congress, and then to say to the carriers, "Take it or leave it." Such a bootstrap device could be utilized to support any power asserted by the Commission, however unlawful.

Throughout its Jurisdictional Statement, the Commission seeks to obscure the lack of support for its position in the statute and in all prior judicial and Commission decisions by pointing to the critical economic problems now facing the industry. (*E.g.*, JS 11-12.) But this cannot justify the Commission's arrogation of power which the statute reserves to management. Chessie shares the Commission's concern over the health and vigor of the industry, as evidenced by the massive expenditures Chessie has made to improve efficiency. But the Commission's concern cannot justify its exercise of a power not granted by Congress.

If the Interstate Commerce Act as it now exists is to be drastically altered by granting to the Commission the power here sought, this should be done only by Congress after full hearings and due deliberations by the appropriate committees, weighing all the complex facets of such an extreme proposal. This is the very essence of the legislative function.

The District Court has remanded the case to the Commission. The Commission will then reconsider its orders in light of the Court's determination that the conditions are unlawful. The Commission's authority to pass on the justness and reasonableness of the increase will still exist subject to the *caveat* that the reasonableness of the rates cannot be made to depend upon unlawful conditions. Thus, the statutory scheme of regulation envisioned by Congress and consistently observed until now by the Commission will be preserved and followed.

The three-judge District Court below carefully considered the Commission's contentions that § 15a(2) of the Act in conjunction with § 15(7) conferred upon the Commission the vast powers it now asserts for the first time in its history. After reviewing the *Los Angeles* and the *Pennsylvania R.R.* cases as well as all other judicial and Commission precedents on the subject, the District Court concluded (JS 21a-22a):

> "[These decisions] unmistakably establish that the Commission has no general power to control a railroad's expenditures. No provision of § 15(7), authorizing suspension of rate increases, implies that the Commission may exercise, as an incident to suspension, the control over expenditures that Congress has otherwise withheld from it. Lacking statutory authority to exercise this control directly, the Commission cannot accomplish the same result indirectly. *T.I.M.E.* v. *United States*, 359 U.S. 464, 475 (1959)."

The Commission has presented nothing in the way of argument or authority for a different result. If new fields are to be explored, that is for Congress, which by its hearing procedures can balance policies and articulate conditions and limitations.

CONCLUSION

The decision below warrants no further review. Chessie moves to affirm.

Respectfully submitted,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL.

By GEORGE D. GIBSON
Counsel

OWEN CLARKE
DOYLE S. MORRIS
CHARLES C. RETTBERG, JR.
3100 Terminal Tower
Cleveland, Ohio 44101

GEORGE D. GIBSON
E. MILTON FARLEY, III
T. S. ELLIS, III
DAVID S. BROLLIER
RICHARD D. GARY
HUNTON, WILLIAMS, GAY & GIBSON
Post Office Box 1535
Richmond, Virginia 23212

Of Counsel